INDEX

CITATIONS

665875—43

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 295

CLOVERLEAF BUTTER COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 81–86) is reported at 148 F. 2d 365. The district court did not render an opinion.

JURISDICTION

The judgment of the circuit court of appeals was entered March 27, 1945 (R. 86), and a petition for rehearing (R. 87–94) was denied May 5, 1945 (R. 95). The petition for a writ of certiorari was filed August 3, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the fact that the production of renovated butter is taxed and regulated under the Renovated Butter Act renders the seizure provisions of the federal Food, Drug, and Cosmetic Act inapplicable to packing stock butter and ladled butter apparently intended for use in the preparation of renovated butter.

STATUTES INVOLVED

The federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 676, 52 Stat. 1040, 21 U. S. C. 301 et seq., provides in part:

> SEC. 201. For the purposes of this Act—
>
> * * * * *
>
> (f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.
>
> * * * * *
>
> SEC. 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *.
>
> * * * * *
>
> SEC. 402. A food shall be deemed to be adulterated—

> (a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; * * *.

The Renovated Butter Act of May 9, 1902, c. 784, 32 Stat. 194, Internal Revenue Code, §§ 2320–2327 (26 U. S. C. 2320–2327), and the regulations promulgated by the Secretary of Agriculture for carrying into effect the Renovated Butter Act, are printed in the Appendix to the petition for a writ of certiorari, pp. 16–40.

STATEMENT

Proceeding under Section 304 (a) of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. 334 (a), the United States, on July 1, 1940, and July 6, 1940, respectively, filed a libel of information and an amendment to the libel in the District Court of the United States for the Northern District of Alabama against 24 cans of ladled butter, of which the Cloverleaf Butter Company, hereinafter referred to as petitioner, is the claimant. The United States proceeded on the ground that the product seized was adulterated within the meaning of Section 402 (a) (3) of the Act, 21 U. S. C. 342 (a) (3), in that it consisted in whole or in part of a filthy animal substance. (R. 1–3.) Four other libels of information thereafter were filed against quantities of ladled butter and packing stock butter, of which petitioner is the claimant, on the ground that they were likewise

adulterated under Section 402 (a) (3) of the Act in that they consisted in whole or in part of filthy or decomposed animal substances, i. e., maggots, rodent hairs, miscellaneous insect eggs and fragments, etc. (R. 4–13). These latter causes were consolidated for trial with the libel filed against the 24 cans (R. 29–30).

Petitioner is a corporation with its place of business in Birmingham, Alabama, operating under federal license a renovated butter factory. It purchases from farmers and country merchants packing stock butter, constituting the material from which it manufactures process or renovated butter. (R. 63–64, Pet. 2; see also *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 150.) After the libels specified above had been filed, petitioner obtained an order from the district court, on February 17, 1942, directing that the products seized be delivered to petitioner for renovation (R. 31–34). The United States then petitioned the circuit court of appeals for a writ of mandamus to compel the district court to vacate the order as being without authority of law and to set a date for the trial of the causes. On December 16, 1943, in *In re United States,* 140 F. 2d 19, the circuit court of appeals directed the district court to proceed under the libels to determine whether the seized products are food and are adulterated within the meaning of the Act and to enter its decree accordingly (see R. 82).

Following the decision of the circuit court of appeals in *In re United States, supra,* petitioner moved in the district court to dismiss the suits. Apparently in reliance upon a theory drawn from the *Cloverleaf Butter* decision, *supra,* petitioner contended that the handling and use of packing stock butter are governed exclusively by the federal Renovated Butter Act and the regulations promulgated by the Secretary of Agriculture thereunder, so that the materials which it intended to use in its factory were not subject to seizure under the federal Food, Drug, and Cosmetic Act (R. 63–65). The district court held that the motion was well taken, directed that the products seized be restored to petitioner, and dismissed the libels (R. 66–67).

Upon appeal by the United States to the circuit court of appeals, the judgments of the district court were reversed and the causes were remanded with directions to proceed with the libels in accordance with the prior opinion of the circuit court of appeals in *In re United States* and with its opinion on the appeal (R. 86).

ARGUMENT

The provisions of the federal Food, Drug, and Cosmetic Act are clearly applicable in their terms to the products proceeded against in these actions. The Act (Section 201 (f), 21 U. S. C. 321 (f)) defines food as "(1) articles used for food or drink for man or other animals, * * * and

(3) articles used for components of any such article." Section 304 (21 U. S. C. 334) declares that any article of food that is adulterated when introduced into or while in interstate commerce shall be liable to be proceeded against on libel of information and condemned, and Section 402 (a) (3) (21 U. S. C. 342 (a) (3)) declares that a food shall be deemed to be adulterated "if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food."

The definition of food contained in the Act is broader than that appearing in the predecessor Food and Drugs Act of 1906 (34 Stat. 769, 21 U. S. C. (1934 ed.) 1 *et seq.*), which defined food as including "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound." Even under the earlier statute, however, the Food and Drug Administration had seized packing stock butter consigned to process butter plants, and this had been upheld. See *United States* v. *Nine Barrels of Butter,* 241 Fed. 499 (S. D. N. Y.), cited with approval in *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 163; see also fn. 5 of the dissenting opinion in the *Cloverleaf* case, 315 U. S. at 176.

Petitioner contends that the process of manufacturing renovated butter from packing stock butter is subject exclusively to regulation under

the Renovated Butter Act and that if packing stock butter is subject to seizure under the Food, Drug, and Cosmetic Act, the purposes of the former statute and the functions of the Secretary of Agriculture thereunder will be frustrated (Pet. 6–7, 13–14).[1] Although the *Cloverleaf* case, *supra,* was concerned with the power of a state under its pure food laws to condemn packing stock butter in view of the provisions of the Renovated Butter Act, and the issue raised in the instant case was not directly involved, we submit that petitioner's contention is foreclosed by the opinion in that case, where this Court stated (315 U. S. at 163): "It should be noted that packing stock adulterated under the definitions of § 402 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1046, when introduced into or while in interstate commerce may be confiscated under § 304 while in interstate commerce or at any time

[1] The Renovated Butter Act (see Pet. 16–23) levies a poundage tax upon such butter and a tax on manufacturers, extends to renovated butter factories the sanitary provisions applicable to slaughtering, meat canning, and similar establishments, and provides that the Secretary of Agriculture shall inspect the places of manufacture and storage of process or renovated butter as well as renovated or process butter itself, and that "he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States * * * he shall have power to confiscate the same" (26 U. S. C. 2325).

thereafter. Cf. *United States* v. *Nine Barrels of Butter,* 241 F. 499."

Petitioner argues, however, that the Food, Drug, and Cosmetic Act cannot, consistently with the regulatory provisions of the Renovated Butter Act, be applied to packing stock butter procured for purposes of renovation and that Congress therefore could not have intended that such butter should be subject to the provisions of the former statute. We think this argument cannot prevail. It should be noted at the outset that if Congress had intended to except packing stock butter from the all-embracing provisions of the Food, Drug, and Cosmetic Act it would seem that such a limitation would have been clearly expressed, particularly since the Food and Drug Administration had, under the predecessor Food and Drugs Act of 1906, repeatedly seized packing stock butter consigned to renovated butter plants. See fns. 4 and 5 of the dissenting opinion in the *Cloverleaf* case, 315 U. S. at 174 and 176, and *United States* v. *Nine Barrels of Butter, supra.* Instead, Section 902 of the Act (21 U. S. C. 392) declares that its provisions shall not interfere with the operation of certain designated statutes, but does not mention the Renovated Butter Act.

Contrary to petitioner's contention, there is no such inconsistency between the two statutes as requires an exception of packing stock butter from the provisions of the Food, Drug, and Cosmetic

Act. Both are concerned with protecting the consuming public. Nor is there any conflict in the administration of the statutes. As both the majority and dissenting opinions in the *Cloverleaf* case point out, the Secretary of Agriculture has no authority under the Renovated Butter Act to confiiscate packing stock butter intended for renovation, but only the renovated butter itself if found to be deleterious. 315 U. S. at 163, 166, 171. The authorization to the Secretary to inspect packing stock butter and seize finished renovated butter does not imply that Congress intended to hamper federal control under the Food, Drug, and Cosmetic Act over the contaminated material before its manufacture into the finished product. It is thus clear that the seizure under the latter statute of adulterated packing stock butter does not infringe upon the powers and duties of the Secretary under the Renovated Butter Act.[2]

[2] A memorandum of the Chief of the Bureau of Dairy Industry to the Solicitor of the Department of Agriculture, dated October 4, 1940, which is quoted in part in fn. 4. of the Chief Justice's dissent in the *Cloverleaf* case, 315 U. S. at 174, pointed out that the development and perfection of new methods for analyzing butter has resulted in increased regulatory activity and action, particularly by state agencies and the federal Food and Drug Administration, against packing stock butter intended for use in the manufacture of renovated butter, and stated: "The Bureau of Dairy Industry, which is the administrative agency designated by the Secretary of Agriculture to enforce the process or renovated butter act, is entirely sympathetic with the activities of these agencies * * *."

Petitioner's position, on the other hand, would tend to defeat the design of the Food, Drug, and Cosmetic Act, which this Court has recently said must be construed liberally and with due regard for its beneficent purposes to keep impure and adulterated food and drugs out of the channels of interstate commerce. *United States* v. *Dotterweich*, 320 U. S. 277, 280. For if seizure of contaminated packing stock butter cannot be effected because of the professed intention of the processor to renovate it before it reaches the ultimate consumer, the Government is left powerless (unless it should be found pursuant to the Renovated Butter Act that the material is unwholesome or deleterious to health in the finished product) to condemn an article of food which is notoriously filthy and adulterated.[3] The specific function of the seizure provisions of the federal Food, Drug, and

[3] In his dissenting opinion in the *Cloverleaf* case the Chief Justice quoted the following from a letter written in July 1941 by the Assistant Chief of the Bureau of Dairy Industry to the Solicitor of the Department of Agriculture (315 U. S. at 173, fn. 3):

"It is axiomatic that despite the processes through which butter or butter oil pass during the course of manufacturing renovated butter, certain soluble materials unfit for human consumption cannot be removed and it is difficult if not impossible to detect them in the finished product. For example, a lot of butter may be infested with maggots and should be condemned for use in the manufacture of renovated butter. If not, in the melting process fat from these maggots will be mixed with the butter fat and the animal fat may be detected in the finished product only by chemical laboratory tests, if at all."

Cosmetic Act is to arrest the flow of such illicit articles before they reach the consuming public. It is obvious, of course, that there is no assurance that, if not condemned, a proscribed article of food or component thereof actually will not reach the public in the adulterated state in which it passes through interstate commerce. But if such speculation were to be permitted, the seizure provisions of the Act would be frustrated. And so the courts have held repeatedly that the conceded intention of a claimant to eliminate the objectionable element of an adulterated food before it reaches the public cannot divest a court of its power and obligation to condemn the food. *United States* v. *52 Drums Maple Syrup, etc.*, 110 F. 2d 914 (C. C. A. 2); *Union Dairy Co.* v. *United States*, 250 Fed. 231 (C. C. A. 7); *United States* v. *Thirteen Crates of Frozen Eggs*, 215 Fed. 584 (C. C. A. 2), affirming 208 Fed. 950 (S. D. N. Y.); *United States* v. *426 Bags of Economy Special Hog Feed*, 276 Fed. 34 (W. D. Mich.).

Finally, petitioner's professed fear (see Pet. 10) that the renovated butter industry "cannot survive" if adulterated packing stock butter is to be subjected to seizure under the Food, Drug, and Cosmetic Act, is negated by established facts. As we have shown, the Food and Drug Administration has long proceeded against adulterated packing stock butter (see p. 6 and fn. 2, p. 9, *supra*). In his dissenting opinion in the *Cloverleaf* case the Chief Justice adverted to a report

of the Administration showing that between July 1, 1933, and January 1, 1942, thirty-six seizures were made of lots of such butter which had been consigned to renovated butter plants (315 U. S. at 176, fn. 5). Yet during the decade 1931–1941, production of renovated butter increased from 1,499,041 to 2,706,852 pounds (see table set out in fn. 21 of the majority opinion in the *Cloverleaf* case, 315 U. S. at 167).

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
VINCENT A. KLEINFELD,
Attorneys.

SEPTEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945